



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 24, 1998

Ms. Lan P. Nguyen
Assistant City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251-1562

OR98-2003

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117831.

The City of Houston (the "city") received an open records request for "all completed investigations by the Office of the Inspector General's Office since its inception, including, but not limited to, all investigative reports on the Houston Parks and Recreation Department." You have submitted to this office as responsive to the request seven files of investigations conducted by the Public Integrity Review Group ("PIRG"). You seek to withhold six of these files pursuant to either section 552.103 or 552.108 of the Government Code. You also contend that some of the information at issue must be withheld from the public pursuant to section 552.101 of the Government Code.

We note at the outset that the city received the open records request on June 1, 1998. You requested a decision from this office on June 16, 1998. Consequently, you failed to request a decision within the ten business days required by section 552.301(a) of the Government Code. Section 552.301(a) requires a governmental body to release requested information or to request a decision from the attorney general within ten business days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to timely request a decision after receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. See *Hancock*, 797 S.W.2d at 381.

Because you have not presented this office with compelling reasons for withholding the requested information pursuant to sections 552.103 or 552.108, we deem these exceptions to disclosure as being waived. We will, however, address the applicability of section 552.101 of the Government Code as well as other exceptions that prohibit the release of confidential information. *See* Gov't Code § 552.352. All of the requested information not specifically addressed below must be released to the requestor in its entirety.

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You contend that one of the files you submitted to this office is made confidential under chapter 143 of the Local Government Code, which sets forth civil service rules for municipal fire and police departments. Subchapter G of that chapter contains provisions applicable to municipalities with a population of 1.5 million or more, including the City of Houston. *See* Open Records Decision No. 642 (1990). Section 143.1214(b) of the Local Government Code requires city fire departments to withhold from disclosure "an investigatory document that relates to a disciplinary action against a fire fighter . . . that was overturned on appeal" and "any document in the possession of the department that relates to a charge of misconduct against a fire fighter . . . that the department did not sustain." A review of the submitted information reveals that the records at issue pertain to a complaint against a fire fighter that was not sustained. The city therefore must withhold this file from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 143.1214(b) of the Local Government Code.

Some of the files submitted to this office contain criminal history record information ("CHRI"). The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 10-12 (1990). Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the CHRI except to another criminal justice agency for a criminal justice purpose. Gov't Code § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by Government Code chapter 411, subchapter F.

We also note that one of the files submitted to this office contains copyrighted information. The copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow *inspection* of copyrighted materials unless an exception to required public disclosure applies to the information. Attorney General Opinion JM-672 (1987) at 2-3. Also, the requestor may make copies of copyrighted materials unassisted by

the state. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2.

Thus, the city may allow the requestor to view the copyrighted materials, and may also allow him to reproduce the material without assistance so long as such reproduction would not unreasonably disrupt the city's working conditions. *See* Attorney General Opinion JM-757 (1987). It will be the requestor's responsibility to adhere to the federal copyright law.

Section 552.101 of the Government Code also protects information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

We have reviewed Exhibit 4 and conclude that the city may not withhold the information you have highlighted pursuant to common-law privacy. Exhibits 6 and 6-A, on the other hand, concerns the investigation of a complaint of sexual harassment that contains information that must be withheld on privacy grounds, as discussed below.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation.

The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Ellen*, 840 S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation, in part because it ruled that he had waived any privacy interest he may have had in the information by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.*

In this instance, however, it is not clear to this office whether or to what extent the city has released details of the alleged sexual harassment and the subsequent investigation

to the public. This office has no basis for concluding that the city has sufficiently informed the public of the details of the investigation. In the instance case, this office feels compelled to follow the *Ellen* decision with regard to victims' and witnesses' identities; we have marked the types of information the city must withhold to protect the identities of these individuals. However, the court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity or the content of his statement, and we decline to extend such protection to the accused individual here. We believe there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace. *See, e.g.*, Open Records Decision Nos. 484 (1987), 400 (1983). Consequently, the city must release all remaining information pertaining to the allegations. *Cf.* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

The documents you submitted to this office contain the home address, home telephone number, and social security numbers of city employees, as well as information revealing whether the employees have family members. Section 552.117(1) of the Government Code requires that the city withhold these types of information, but only if the employee has elected to keep this information confidential in accordance with section 552.024 of the Government Code. Assuming the subject employees have made such an election prior to the city's receipt of the open records request, we conclude that these types of information must be withheld. *See* Open Records Decision No. 530 (1989). However, even if such an election has not been made, we note that section 552.117(2) makes confidential the same categories of information pertaining to "a peace officer as defined by Article 2.12, Code of Criminal Procedure." Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988).

Finally, we note that section 552.130 of the Government Code requires that the city withhold information that relates to

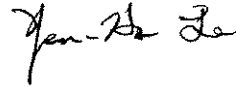
- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

The records at issue contain drivers license and license plate number information that are made confidential under section 552.130. The city must withhold these types of information pursuant to section 552.130.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue

under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/RWP/nc

Ref.: ID # 117831

Enclosures: Marked documents

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(w/o enclosures)